IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM E. DAWSON,	)	
	)	
Plaintiff,	)	**CIVIL ACTION**
	)	
v.	)	**No. 03-2072-KHV**
	)	
ANTHONY J. PRINCIPI,	)	
SECRETARY OF VETERANS AFFAIRS,	)	
	)	
Defendant.	)	
	)	

ORDER

This matter is before the Court on Defendant's Motion To Dismiss Pursuant To Fed. R. Civ. P. 12(b)(6) Or In The Alternative, Motion For Summary Judgment Pursuant To Fed. R. Civ. P. 56 (Doc. #11) filed October 2, 2003 and Defendant's Motion Pursuant To D. Kan. Rule 7.4 (Doc. #15) filed November 3, 2003.

Pursuant to D. Kan. Rule 6.1(e)(2) and Fed. R. Civ. P. 6(a), plaintiff had until October 27, 2003 to file a response to defendant's motion to dismiss or for summary judgment. To date, plaintiff has not responded to defendant's motion. Pursuant to D. Kan. Rule 7.4, "[i]f a respondent fails to file a response within the time required by Rule 6.1(e), [or as extended by the court,] the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice." After reviewing defendant's motion and supporting memorandum, the Court concludes that because the motion relies on evidence outside the complaint, it should be treated as one for summary judgment. When deciding whether to enter summary judgment against a non-responding party, the Court cannot simply grant the motion as

uncontested under D. Kan. Rule 7.4, but instead the Court must determine whether summary judgment is appropriate under Rule 56(e), Fed. R. Civ. P. See Reed v. Bennett, 312 F.3d 1190, 1195 (10th Cir. 2002). Accordingly, the Court overrules defendant's motion to sustain its motion to dismiss or for summary judgment on the sole ground that it is uncontested. For reasons stated below, however, the Court sustains defendant's motion for summary judgment.

Legal Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The non-moving party may not rest on its pleadings but must set forth specific facts. Applied Genetics, 912 F.2d at 1241.

"[W]e must view the record in a light most favorable to the parties opposing the motion for summary judgment." Deepwater Invs., Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative. Anderson, 477 U.S. at 250-51. "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." Conaway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

Factual Background

For purposes of defendant's motion for summary judgment, the following facts are deemed admitted.

Plaintiff is an employee at the Dwight D. Eisenhower Veterans Affairs Medical Center in Leavenworth, Kansas. On December 31, 2001, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The Department of Veterans Affairs ("VA"), Office of Employment Discrimination Complaint Adjudication, accepted the charge for investigation. On October 22, 2002, the VA issued a final agency decision on plaintiff's charge and sent plaintiff a copy of that decision by certified mail. The decision advised plaintiff that he had the right to challenge the agency decision by filing a civil action in an appropriate United States District Court within 90 days of receipt of the decision or by appealing the decision to the EEOC Office of Federal Operations within 30 days of receipt of the decision.

On October 28, 2002, the United States Postal Service delivered the VA decision and accompanying letter to plaintiff's home. "B. Dawson" signed for the mailing. Plaintiff filed suit on February 18, 2003, 113 days later.

Analysis

Defendant argues that because plaintiff did not timely file his complaint, the action must be dismissed. A plaintiff must file suit within 90 days from the date he receives notice of final agency action. See 42 U.S.C. § 2000e-16(c); Belhomme v. Widnall, 127 F.3d 1214, 1217 (10th Cir. 1997). Although the complaint alleges that plaintiff did not receive the VA decision until November 22, 2002, the undisputed evidence establishes that he received it on October 28, 2002 or – at a minimum – that someone at his home received the decision that day.[1] Accordingly, the Court finds that plaintiff had notice of the VA decision effective October 28, 2002. See Million v. Frank, 47 F.3d 385, 389 (10th Cir. 1995) (receipt of right to sue letter by wife sufficient to trigger period to file Title VII complaint even though plaintiff did not see letter until several days later); Hanson v. Beloit Newspapers, Inc., No. 94-4023-SAC, 1995 WL 646808, at *7 (D. Kan. Sept.15, 1995) (receipt of mailed notice at plaintiff's address sufficient to commence 90-day period; date of receipt not delayed until plaintiff opens mailed notice unless equitable considerations would warrant tolling).

Although plaintiff filed his complaint on February 18, 2003, 23 days outside the 90 day period, compliance with the filing requirement is not a jurisdictional prerequisite; rather, it is a condition precedent to suit that functions like a statute of limitations and is subject to waiver, estoppel and equitable tolling. See

[1] Plaintiff has not asserted that "B. Dawson" is someone other than himself.

Mosley v. Pena, 100 F.3d 1515, 1518 (10th Cir. 1996). Equitable tolling may be appropriate where "defendant has actively misled the plaintiff respecting the cause of action, or where the plaintiff has in some extraordinary way been prevented from asserting his rights." Million, 47 F.3d at 389 (quoting Carlile v. South Routt Sch. Dist., 652 F.2d 981, 985 (10th Cir. 1981)). As explained above, plaintiff has not responded to defendant's motion and his complaint does not assert any grounds upon which the Court could afford him equitable relief. Because plaintiff did not file this action within 90 days after receiving notice of the VA decision, plaintiff's complaint is untimely as a matter of law.

IT IS THEREFORE ORDERED that Defendant's Motion To Dismiss Pursuant To Fed. R. Civ. P. 12(b)(6) Or In The Alternative, Motion For Summary Judgment Pursuant To Fed. R. Civ. P. 56 (Doc. #11) filed October 2, 2003 be and hereby is **SUSTAINED**.

IT IS FURTHER ORDERED that Defendant's Motion Pursuant To D. Kan. Rule 7.4 (Doc. #15) be and hereby is **OVERRULED**.

Dated this 10th day of November, 2003, at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge